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No. 82-98

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN SCALZITTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court properly admitted evidence about a cooperation agreement between the government and an informant.

2. Whether the trial court properly submitted additional instructions in writing to the jury.

3. Whether the trial court considered improper information in sentencing petitioner.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1982. A petition for a writ of certiorari was filed on July 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of conspiring to distribute cocaine hydrochloride (Count 1) in violation of 21 U.S.C. 846, and of possessing with intent to distribute and unlawfully distributing cocaine hydrochloride (Count 2) in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to five years' imprisonment on

Count 1 and five years' imprisonment and three years' special parole on Count 2, the sentences to run consecutively.[1]

The evidence at trial showed that one Charles Hindmarsh, a government informant known to petitioner through a prior drug transaction, arranged a meeting in Greensburg, Pennsylvania on January 30, 1981, between petitioner, Robert Weldon, and FBI Agent Mike Wolf, who (with Hindmarsh) was posing as an agent of one Lenny Marcharella.[2] At the meeting, Hindmarsh expressed Marcharella's desire to set up a "connection" with petitioner for the purchase of a large quantity of cocaine (Tr. 187). Petitioner assured Hindmarsh and Wolf that he could provide large quantities of high quality cocaine at varying prices, depending upon the location of the delivery point (Tr. 188, 194-195). Petitioner required, however, that the negotiations for the purchase of the first kilogram of cocaine be conducted in Florida (Tr. 206).

Accordingly Hindmarsh travelled to Florida on February 5, 1981, but was unable to contact petitioner. Two weeks later, at a meeting in Greensburg, petitioner and

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[1]Petitioner's co-defendant, Robert Weldon, was also convicted on Counts 1 and 2, and on an additional count of possession of cocaine with intent to distribute. Weldon's convictions were also affirmed by the court of appeals.

[2]Hindmarsh's cooperation was the result of a plea arrangement whereby pending wire fraud charges were to be either dismissed or reduced to a probationary term (Tr. 63). The FBI and the Drug Enforcement Administration had enlisted Hindmarsh's assistance in their investigation of drug-related activities of Lenny Marcharella (Tr. 68). (Some citations to the trial transcript ("Tr.") refer to pages where tape recordings—not transcribed—were played for the jury. Citations to the sentencing hearing transcript ("S. Tr.") are based on record references in the government's brief in the court of appeals.)

Hindmarsh discussed the problems delaying culmination of the cocaine transaction and made arrangements to meet again on February 26.

At the February 26 meeting, conducted in a motel in Monroeville, Pennsylvania, petitioner introduced his associate, Lou Raucci. After the parties reached an agreement concerning the cocaine transaction, Hindmarsh asked for a sample to show his supposed principals (Tr. 304). Raucci responded that he would make a call to New York (*ibid.*), and Raucci and petitioner then left the motel. Ten minutes later, petitioner returned and announced that he had arranged for Hindmarsh to receive a sample (Tr. 309).

At a final meeting on March 5, 1981, Hindmarsh met with petitioner and Weldon at the same motel. Petitioner gave Hindmarsh a sample of the cocaine, and petitioner and Weldon left the motel. A subsequent FBI analysis of the cocaine revealed, however, that it was not of the high quality promised by petitioner.

Within a few hours Hindmarsh and an FBI agent, posing as the person who had tested the cocaine, met with petitioner to discuss the cocaine's poor quality. Petitioner offered to take the sample to an "expert" to have it analyzed, and the FBI agent and Hindmarsh then left (Tr. 375). Petitioner and Weldon were arrested as they left the motel.

ARGUMENT

1. Petitioner contends (Pet. 10-15) that admission of a portion of Hindmarsh's cooperation agreement, which required that he testify truthfully, constituted improper vouching for his credibility as a witness. This argument is without merit.

During its direct examination of Hindmarsh, the government asked him whether he was testifying pursuant to an immunity agreement. When he confirmed that he was,

counsel for petitioner requested that a portion of the agreement conditioning immunity on truthful testimony not be revealed to the jury. The portion of the agreement quoted by petitioner (Pet. 6) was not in fact read in open court (Tr. 62). The district court did, however, permit testimony concerning the terms of the plea agreement, concluding that complete disclosure was necessary to permit the jury to assess adequately the witness's credibility. The government elicited testimony from Hindmarsh as to his interpretation and understanding of the plea agreement (Tr. 59-65).

A prosecutor may not inject his personal opinion on the credibility of a witness. *Lawn* v. *United States*, 355 U.S. 339, 359-360 n.15 (1958). The principal reason for this rule is the concern that the jury will infer that the prosecutor has an independent basis, apart from the evidence introduced at trial, for crediting the witness's testimony. In determining whether a prosecutor has vouched for the credibility of a witness, a court must determine whether the jury could reasonably believe that he indicated a personal belief in the witness's credibility. See, e.g., *United States* v. *Bess*, 593 F.2d 749, 756-757 (6th Cir. 1979); *United States* v. *Ellis*, 547 F.2d 863, 869 (5th Cir. 1977); *Orebo* v. *United States*, 293 F.2d 747, 749 (9th Cir. 1961), cert. denied, 368 U.S. 958 (1962).

In cases where a prosecutor has either elicited from a witness or revealed to a jury the terms of a cooperation agreement, the courts of appeals have consistently upheld the admission of such evidence against claims of improper vouching. See *United States* v. *Arroyo-Angulo*, 580 F.2d 1137, 1146 (2d Cir.), cert. denied, 439 U.S. 913 (1978); *United States* v. *Edwards*, 631 F.2d 1049, 1052 (2d Cir. 1980) (the government may introduce such a plea agreement on redirect examination after the witness's credibility has been attacked, and may introduce such evidence on

direct examination if it is clear that the witness's credibility will be attacked); *United States* v. *Creamer*, 555 F.2d 612, 617 (7th Cir.), cert. denied, 434 U.S. 833 (1977) (questioning a government witness on direct examination about the agreement's requirement that he speak truthfully did not bolster the witness but, rather, established the pressures under which the witness was testifying); *United States* v. *Miceli*, 446 F.2d 256, 261 (1st Cir. 1971) (prosecutor's reference in closing argument to witness's arrangement with the government to testify truthfully was not plain error); *United States* v. *Rosson*, 441 F.2d 242, 244 (5th Cir.), cert. denied, 404 U.S. 843 (1971) (prosecutor is allowed to elicit full terms of the agreement on redirect after witness's credibility is attacked on cross-examination). As petitioner points out (Pet. 11), the Ninth Circuit has expressed concern that a jury might construe a plea agreement containing a promise to testify truthfully as improper vouching by the government. But that court has declined to prohibit evidence of such a promise. Instead, it has stated that the "trial court should be alert to the problem of vouching before admitting * * * [evidence of the promise and] should consider the phrasing and content of the promise to ascertain its implications and decide whether an instruction to the jury would dispel any improper suggestions." *United States* v. *Roberts*, 618 F.2d 530, 536 (9th Cir. 1980).

The government does not vouch for the credibility of a witness by merely offering in evidence the witness's testimony about his understanding of an agreement's implications. As the Second Circuit noted in *United States* v. *Arroyo-Angulo*, *supra*, 580 F.2d at 1146, the existence of a cooperation agreement is a "double-edged sword and it is debatable which edge cut[s] more deeply." While it suggests that the witness has a motive to be truthful, it also indicates that he may feel a need to please the government with testimony favorable to its case. Hence, admission of the

whole agreement, including the promise to be truthful, effectively balances the interests of the government and the defendant by revealing all the witness's possible motives.

This is what transpired in petitioner's trial. The government introduced the agreement, not to vouch for Hindmarsh's testimony, but as an indication of the conflicting pressures under which he was testifying. The jury was clearly entitled to consider and evaluate any interest that Hindmarsh may have had as a consequence of the plea bargain so as not to be misled about its terms or importance. See *United States* v. *Rosson, supra*, 441 F.2d at 244.[3]

2. Petitioner next contends (Pet. 16-18) that the district court abused its discretion in submitting to the jury a written copy of a portion of its instructions, after the jury expressed confusion with part of the charge concerning conspiracy. Petitioner complains that the submission of the written instruction prejudiced his case by stressing that portion of the charge. The court of appeals properly declined to find an abuse of discretion.

As this Court has explained, "[w]hen a jury makes explicit its difficulties [with a closing instruction,] a trial judge should clear them away with concrete accuracy."

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[3]Petitioner further contends (Pet. 14) that the prosecutor impermissibly vouched for Hindmarsh in his summation, during which he argued that Hindmarsh had a great deal to lose if he lied. Because the closing argument was not transcribed, we are uncertain about the nature of the prosecutor's references to the plea agreement in closing argument, and whether petitioner objected to such references. In any event, such an argument would be proper. A comment by the prosecutor in closing argument that a witness would be subject to indictment for perjury if he lied does not constitute improper vouching, but rather is a permissible argument that the witness, whose credibility has been attacked, had some motive to testify truthfully. *United States* v. *Ricco*, 549 F. 2d 264, 274 (2d Cir.), cert. denied, 431 U.S. 905 (1977); *United States* v. *Arroyo-Angulo, supra*, 580 F.2d at 1147.

Bollenbach v. *United States*, 326 U.S. 607, 612-613 (1946). Here the trial court cleared away the jury's confusion about the elements of conspiracy by submitting a written copy of a portion of his original charge. Supplemental instructions reiterating exactly those parts of the original charge requested by the jury have been determined to be adequate. See, e.g., *United States* v. *Blevins*, 555 F. 2d 1236, 1239 (5th Cir. 1977), cert. denied, 434 U.S. 1016 (1978); *United States* v. *Chatham*, 568 F.2d 445, 451 n.10 (5th Cir. 1978).

Petitioner notes (Pet. 17) that the district court should on occasion instruct the jury not to emphasize the supplemental charge over the original instruction as a whole. Failure to give such an instruction is not reversible error by itself, however, but is only one factor to weigh in assessing possible prejudice to the defendant from a supplemental charge that unduly emphasizes the government's case. *United States* v. *Sanfilippo*, 581 F.2d 1152, 1155 n.3 (5th Cir. 1978). The supplemental charge here did not display any partiality to the government's case, but rather responded exactly to the jury's request. Moreover, since petitioner made no request that the trial court charge that the supplemental instruction be considered together with the instructions as a whole, he has no valid basis for complaint.

3. At the sentencing hearing, the government offered testimony as to certain documents found in petitioner's briefcase, including certain newspaper articles about organized crime and a letter from one John Bazzano. The government also introduced the 1980 Pennsylvania Crime Commission report, in which petitioner was mentioned and Bazzano was mentioned prominently (S. Tr. 19-21). Petitioner claims (Pet. 19-22) that the district court should not have considered this information in determining the sentence.

In imposing the sentence, the district court stated as follows (S. Tr. 32-33):

> [T]here is no doubt on March 5, 1981 you sold to a man whom you did not realize at the time was an FBI agent a quantity of 100 per cent pure cocaine, and during the negotiation leading up to that transaction you bragged consistently you could deliver enormous quantities of this drug. The impact of that amount of drugs in a community is difficult to imagine. In your drug dealings you have also unfortunately enticed another individual to join you in this crime. Your reputed ties to organized crime are also very, very troubling to me.
>
> * * * * *
>
> Because of the danger you present by the possibility of being able to unleash into a community such a large quantity of very dangerous and debilitating drugs, I have decided that a substantial prison term is in order.

These remarks show that the district court placed primary emphasis on the testimony at trial, including petitioner's self-proclaimed ability to deliver large quantities of cocaine. As to the evidence presented at the hearing, petitioner implicitly concedes—as he must—that the sentencing court could consider more than the criminal act itself, and in particular could take into account petitioner's character and propensities. Cf. *Pennsylvania* v. *Ashe*, 302 U.S. 51, 55 (1937). It is also well settled that, in imposing sentence, the court may rely on hearsay and other evidence that would be inadmissible at trial. 18 U.S.C. 3577; *Williams* v. *New York*, 337 U.S. 241 (1949); *Roberts* v. *United States*, 445 U.S. 552, 556 (1980).

A sentence may not be imposed on the basis of materially false information, but petitioner nowhere states that the evidence of his associations with members of organized

crime was materially false. In any event, as the record demonstrates, in imposing sentence the court relied primarily on petitioner's actions during the commission of the crime.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1982

DOJ-1982-11